Supreme Court, U.S.
FILED
JUL 9 1999
OFFICE OF THE CLERK

(2)

No. 98-2012

In The

Supreme Court of the United States

KATHY LYNN JOSENHANS,

Petitioner,

vs.

THE HONORABLE JUDGE EDWARD CARNES and SHERWOOD MEDICAL CORPORATION, AMERICAN HOME PRODUCTS CORPORATION, AND AMERICAN HOME PRODUCTS CORPORATION GROUP INSURANCE PLAN – UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a Circuit Court abuses its discretion by dismissing an appeal and refusing to decide a case upon its merits, for lack of prosecution.

PARTIES TO THE PROCEEDING

Petitioner, Kathy Lunn Josenhans and her attorney, Frederick C. Morello, Law Office of Frederick Charles Morello, P.O. Box 1007, Daytona Beach, Florida 32115, appeared before the Eleventh Circuit Court of Appeals as plaintiff-appellant.

Respondents, Sherwood Medical Corporation, American Home Products Corp., and American Home Products Corp., Group Insurance Plan – United States and its attorney, William E. Lawton, Dean, Ringers, Morgan & Lawton, P.O. Box 2928, Orlando, Florida 32802-2928, appeared before the Eleventh Circuit Court of Appeals as defendants-appellees.

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ORDERS ENTERED BELOW

Petitioner Josenhans seeks this Honorable Court's review by *certiorari* of the Judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered March 16, 1999 (Appendix "J" to Josenhans' Petition). Petitioner also seeks this Honorable Court's review and issuance of the *Writ of Certiorari* to the Eleventh Circuit Court of Appeals for its Order denying Appellant Josenhans' third request for an extension of time for filing the Initial Brief and entry of dismissal of the appeal. (Appendix "F" to Petition), and Order denying Motion for Reconsideration (Appendix "H" to Petition).

STATEMENT OF THE BASIS FOR JURISDICTION

Petitioner Josenhans attempts to invoke this Honorable Court's *certiorari* jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Respondents strongly object to the large number of non-record, bald allegations and arguments in Petitioner's Statement of the Case. Respondents will provide the Court with a summary of only the record activity below. In the interest of brevity, references will be made to the documents already of record in the Appendix to the pending *Petition for Writ of Certiorari,* made by (PA-___). On July 21, 1998, the U.S. District Court for the Middle District of Florida entered a Final Order granting Respondents' Motion for Summary Judgment on all

claims made against it by Plaintiff/Petitioner Josenhans. Counsel for Plaintiff Josenhans then filed a Notice of Appeal to the Eleventh Circuit Court. (PA-A)

On September 4, 1998, the Circuit Court informed Josenhans that the record was complete and Appellant's Initial Brief and Record Excerpts were due to be filed within forty (40) days, or by October 14, 1998. One day before that deadline, on October 13, 1998, Josenhans filed Appellant's first Motion for a 30-day extension of time to file the Initial Brief. (PA-B).

On October 14, 1998, the Circuit Court issued an Order granting Appellant's Motion for Extension of Time, *in part*. The Court granted Appellant Josenhans fifteen (15) additional days to file Appellant's Brief, until October 29, 1998. (PA-C, ¶ 4). Additionally, the Circuit Court's Order specifically warned counsel for Appellant Josenhans that:

> **"This extension is granted subject to the condition that no additional extensions will be requested by the movant and that the specified document will be filed on or before this new date." (PA-C, ¶ 4).**

Despite that admonition, counsel for Appellant Josenhans filed another Motion for an additional fourteen (14) day extension of time to file the Initial Brief. That Motion was dated October 27, 1998. (PA-D). By Memorandum Order dated October 30, 1998, the Circuit Court granted Appellant Josenhans an extension of time for *seven (7) days*, until November 6, 1998, for filing Appellant's Initial Brief. Again, the Circuit Court gave the same warning that the extension was granted *only* subject to

the condition that no additional extensions would be requested by the movant, and the specified document would be filed by November 6, 1998. (PA-D, ¶ 8-10).

Nevertheless, counsel for Appellant Josenhans filed still another (third) Motion for Extension of Time to file the Initial Brief. By Motion dated November 4, 1998, Appellant Josenhans requested another seven (7) day extension of time from the Circuit Court. (PA-G, ¶ 9-10). This third Motion for Extension of Time was filed one day before the Eleventh Circuit Court's third and final filing deadline of November 6, 1998. (PA-G, ¶ 10).

On November 12, 1998, counsel for Josenhans finally filed the Initial Brief of Appellant Josenhans. (PA-G, ¶ 15). That was six (6) days *after* the third and final deadline given by the Circuit Court for the filing of that Initial Brief.

On December 11, 1998, the Circuit Court of Appeals *sua sponte* entered its Order of Dismissal for Appellant Josenhans' failure to timely file the Initial Brief. The Court also entered a simultaneous Order denying Appellant's third Motion for Extension of Time to November 13, 1998 to file the Initial Brief. (PA-F).

On December 17, 1998, counsel for Appellant Josenhans filed an "Emergency Motion for Panel Consideration" of the Court's dismissal of the Appeal, and requested the Court reinstate the appeal. (PA-G). By Order filed January 25, 1999, a panel of the Circuit Court entered an Order denying Appellant Josenhans' Motion to reconsider the Court's Orders of December 11, 1998, denying the Motion for a third extension of time and

dismissing the appeal. The Court also denied Appellant's Motion to Reinstate the appeal. (PA-H).

Counsel for Josenhans then filed a Petition for Rehearing *en banc* by the Eleventh Circuit Court of its Order of January 25, 1999. (PA-H). By Order filed March 16, 1999, the Court of Appeals reviewed Appellant Josenhans' Petition for Rehearing *en banc* and the history of Appellant Josenhans' untimely prosecution of this appeal under the federal and local rules. (PA-J). In a two-page explanatory Order, the Circuit Court denied Appellant Josenhans' Motion to Reinstate the Appeal. (PA-J).

This appeal ensued, with counsel for Petitioner Josenhans baldly asserting that it was filed:

> **"In an abundance of caution, so to insure that she has exhausted all available avenues for relief to allow for a decision on the merits of her case, and dissuade Circuit Courts from adopting this result as an innovative example of docket clearing." (Petition, p. 6).**

ARGUMENT

Without question, the Circuit Courts of Appeal must have the final authority to demand compliance with their rules and regulations. Chaos would reign in this Honorable Court if every party sanctioned in any manner for failure to comply with a Circuit Court rule or deadline could scurry to the United States Supreme Court for further review of a Circuit Court's procedural decision.

Even when the sanction is dismissal, this Honorable Court for its own good and that of the federal appellate

system must allow Circuit Courts to set their own boundaries for compliance. As this Honorable Court has stated with regard to the failure of appellants to comply with the rules and time deadlines,

> **" . . . inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." *Pioneer Service Co. v. Brunswick Assoc., Ltd., Partnership*, 507 U.S. 380, 391 (1993).**

The Eleventh Circuit Court has rarely had to opine on that obvious doctrine, since it adopted as precedent the decisions of its parent (the former Fifth Circuit Court) rendered prior to October 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). Even where the U.S. Government failed to timely file its Initial Brief on Appeal, the Circuit Court properly dismissed. *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th CCA Fla. 1972). *See also, Jackson v. Hensley*, 484 F.2d 992 (5th CCA Fla. 1973) (appeal summarily dismissed for lack of prosecution for Appellant's failure to file Brief within time fixed by the rules); *Turner v. Duval County, Florida*, 468 F.2d 919 (5th CCA Fla. 1972) (for Appellant's failure to file Brief within the time fixed by rules, appeal was properly dismissed for want of prosecution).

Nothing in Josenhans' argument in the *Petition for Certiorari* demonstrates to the contrary. Generally, the cases cited by Petitioner's counsel in the Argument in support of the Petition do not involve, as here, the unsuccessful seeking of a third extension of time for filing the Initial Brief after clear admonitions from the Court that only *one* would be granted. *See*, i.e., *In re Beverly Mfg. Corp.*, 778 F.2d 656 (11th Cir. 1985).

Simply put, this Honorable Court does have the time or resources to continually delve into the Circuit Courts' decisions on parties' failure to comply with their procedural rules and deadlines. This Court on a rare occasion when it has visited these issues restated the factors that the Courts of Appeal should consider in requiring compliance with their time deadlines:

> **"These include, as the Court of Appeals found, the danger of prejudice to the (opposing party), the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith."** ***Pioneer Service Co., supra,*** **at 391.**

Here, the Petition filed by Josenhans admits the multiple extensions of time Petitioner's counsel sought for filing the Initial Brief of Appeal *and* the warnings received when the Circuit Court granted two separate extensions of time. Petitioner's counsel's failure to heed those warnings and timely file the Brief conflict directly with the ultimate necessity that appeals meet procedural requirements and deadlines. Without same, the schedules of the Courts and opposing parties would be thrown into chaos. *Id.*

CONCLUSION

For all the reasons stated herein or to be found from a review of the record documents attached to the *Petition for Certiorari* that this Brief opposes, the Respondents

respectfully submit that the *Petition for Writ of Certiorari* filed herein should be DENIED.

Respectfully submitted,

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